U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 18305534

Date: OCT. 20, 2021

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Worker (Advanced Degree, Exceptional Ability, National Interest Waiver)

The Petitioner, a martial arts fighter, seeks second preference immigrant classification as an individual of exceptional ability, as well as a national interest waiver of the job offer requirement attached to this EB-2 classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2).

The Director of the Nebraska Service Center denied the petition, concluding that the Petitioner did not establish that he is an individual of exceptional ability. The Director also concluded that the Petitioner did not establish that a waiver of the required job offer, and thus of the labor certification, would be in the national interest.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

I. LAW

To establish eligibility for a national interest waiver, a petitioner must first demonstrate qualification for the underlying EB-2 visa classification, as either an advanced degree professional or an individual of exceptional ability in the sciences arts or business. Because this classification requires that the individual's services be sought by a U.S. employer, a separate showing is required to establish that a waiver of the job offer requirement is in the national interest.

Section 203(b) of the Act sets out this sequential framework:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. –
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> > (A) In general. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national

economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of job offer –

(i) National interest waiver. . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

For the purpose of determining eligibility under section 203(b)(2)(A) of the Act, "exceptional ability" is defined as "a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business." 8 C.F.R. § 204.5(k)(2). The regulations further provide six criteria, at least three of which must be satisfied, for an individual to establish exceptional ability:

(A) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;

(B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought;

(C) A license to practice the profession or certification for a particular profession or occupation;

(D) Evidence that the alien has commanded a salary, or other renumeration for services, which demonstrates exceptional ability;

(E) Evidence of membership in professional associations; or

(F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

8 C.F.R. § 204.5(k)(3)(ii).

In determining whether an individual has exceptional ability under section 203(b)(2)(A) of the Act, the possession of a degree, diploma, certificate, or similar award from a college, university, school or other institution of learning or a license to practice or certification for a particular profession or occupation shall not by itself be considered sufficient evidence of such exceptional ability. Section 203(b)(2)(C) of the Act.

Where a petitioner meets these initial evidence requirements, we then consider the totality of the material provided in a final merits determination and assess whether the record shows sustained national or international acclaim and demonstrates that the individual is among the small percentage at the very top of the field of endeavor. *See Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the documentation is first counted and then, if fulfilling the required number of criteria, considered in the context of a final merits determination); *see also Visinscaia v. Beers*, 4 F. Supp. 3d 126, 131-32 (D.D.C. 2013); *Rijal v. USCIS*, 772 F. Supp. 2d 1339 (W.D. Wash. 2011). This two-step analysis is consistent with our holding that the "truth is to be determined not by the quantity of evidence alone but by its quality," as well as the principle that we examine "each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true." *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

II. ANALYSIS

The Director found that the Petitioner did not establish he is an individual of exceptional ability. The Petitioner does not assert that he qualifies for second-preference employment as a member of the professions holding an advanced degree. If the Petitioner does not establish eligibility as an individual of exceptional ability, we need not determine whether a waiver of the job offer requirement, and thus of a labor certification, would be in the national interest. *See* section 203(b)(2) of the Act. For the reasons discussed below, the Petitioner did not establish that he is an individual of exceptional ability.

As a preliminary matter, the Petitioner asserts on appeal that *Matter of Katigbak*, 14 I&N Dec. 45 (Reg'l Comm'r 1971), "stands for the proposition that a Petitioner cannot create a new eligibility for a benefit where none previously existed" but that "[b]y supplementing the record with events occurring after the filing date, [the] Petitioner is not creating eligibility for this visa category in supplying additional information; rather, he is providing supplementary evidence of eligibility already established." The Petitioner mischaracterizes *Matter of Katigbak*, which specifically states:

> A petition may not be approved for a profession for which the beneficiary is not qualified *at the time of its filing*. The beneficiary cannot expect to qualify subsequently by taking additional courses and then still claim a priority date as of the date the petition was filed, a date on which he was not qualified.

Matter of Katibgak, 14 I&N Dec. at 49 (emphasis added); *see also* 8 C.F.R. § 103.2(b)(1); *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978). Accordingly, the Director did not err by "[using] this holding to preclude consideration of evidence of exceptional ability and success submitted by the Petitioner dated after the initial filing date."

The Director concluded that the Petitioner satisfied the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F), but the Director found that the Petitioner did not satisfy at least two of the five other criteria. On appeal, the Petitioner reasserts eligibility under 8 C.F.R. §§ 204.5(k)(3)(ii)(B)-(E), in addition to the criterion the Director concluded the Petitioner satisfied.[1]

[1] On appeal, the Petitioner does not assert, and the record does not support the conclusion, that the record establishes eligibility at the time of filing under the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(A).

The criterion at 8 C.F.R. § 204.5(k)(3)(ii)(B) requires "[e]vidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought." On appeal, the Petitioner asserts that a one-page letter from the owner and head instructor of [redacted] in [redacted] Alaska, satisfies this criterion. The letter indicates that the Petitioner coached "children's kickboxing classes and [mixed martial arts] classes since 2018" and, in doing so, the Petitioner "is required to plan his own classes and curriculum and has shown a mastery in his craft." The letter further states that the Petitioner's "exceptional knowledge of the sport make him an invaluable asset to our team as well as our community." The letter also indicates that the owner and head instructor coached the Petitioner during that time. The letter does not indicate whether the Petitioner coached kickboxing or mixed martial arts full time, whether the Petitioner participated as a martial arts fighter full time, or whether a combination of coaching and personal participation amounts to full-time experience during the relevant period. Moreover, as of the 2019 petition filing date, the letter addresses at most two years of experience, substantially less than "at least ten years of full-time experience in the occupation" required by 8 C.F.R. § 204.5(k)(3)(ii)(B). Therefore, the record does not satisfy the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(B).

The criterion at 8 C.F.R. § 204.5(k)(3)(ii)(C) requires evidence of "[a] license to practice the profession or certification for a particular profession or occupation." On appeal, the Petitioner asserts that a martial arts fighter "must pass a medical examination to confirm that [the fighter] is healthy enough to fight," which entails "a weigh-in to confirm that [the fighter and the opponent's] body weights fall within a set weight category." The Petitioner further notes that he passed such an examination five times as of the petition filing date, which he describes as an "implicit certification." However, the Petitioner submits no evidence, nor does he cite any supporting law or policy, to establish that a pre-fight medical screening constitutes a license or certification to practice the profession or occupation, as contemplated by the plain language of the regulation. Moreover, as the Petitioner states, these medical screening occur prior to each competition to assess whether a fighter satisfies criteria to participate in a particular competition; the record contains no evidence demonstrating that the events in which he competes have an "implicit certification" based on any number of successful prior screenings. The Petitioner does not assert that he otherwise holds a license to practice the profession. Therefore, the record does not satisfy the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(C).

The criterion at 8 C.F.R. § 204.5(k)(3)(ii)(D) requires "[e]vidence that the [Petitioner] has commanded a salary, or other renumeration [*sic*] for services, which demonstrates exceptional ability." On appeal, the Petitioner states that we "should accept and review the evidence [in the record], regardless of whether the evidence was dated after the initial filing date . . . December 10, 2019." The Petitioner then asserts that his monetary earnings for a fight in [redacted] 2020 satisfies this criterion. However, as noted above, a petitioner must establish eligibility at the time of filing the nonimmigrant visa petition and must continue to be eligible for the benefit through adjudication. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after a petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. at 249. Accordingly, the Petitioner's monetary earnings after the petition filing date may not establish eligibility. The Petitioner further asserts that "his YouTube history showing more than 200,000 views, and his Facebook videos showing more than one million views" satisfies this criterion because "a person with a mere 5,000 followers is considered a 'micro-influencer' on Instagram and can charge from ten dollars to one hundred dollars per post."

However, the record does not contain documentary evidence to support the Petitioner's assertions about his videos' viewership.[2] A petitioner bears the burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012). Moreover, the record does not establish the amount of remuneration the Petitioner has received for any particular video or post and how that remuneration demonstrates exceptional ability as a martial arts fighter. Specifically, the record does not establish whether the Petitioner's remuneration for any particular video or post indicates exceptional ability relative to others working in the Petitioner's field.[3] Therefore, the record does not satisfy the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(D).

The criterion at 8 C.F.R. § 204.5(k)(3)(ii)(E) requires "[e]vidence of membership in professional associations." On appeal, the Petitioner asserts that he "won a contract with the [redacted] by [winning a bout] on [redacted] 2020," that his "participation in [redacted] competitions are] evidence of his membership in the . . . [redacted]" and that certificates for various competitions in [redacted] martial arts competitions satisfy this criterion. Again, evidence regarding events in 2020, after the petition filing date, may not establish eligibility. 8 C.F.R. § 103.2(b)(1); *see also Matter of Michelin Tire Corp.*, 17 I&N Dec. at 249. Additionally, the record does not establish that the [redacted] or the various [redacted] martial arts competitions recognize a participant as a member of a professional association, as compared to simply a participant at a discrete event or specific set of competitions. The Petitioner does not otherwise assert that he holds a membership in a professional association. Therefore, the record does not satisfy the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(E).

In summation, the Petitioner has not satisfied at least three of the six criteria at 8 C.F.R. § 204.5(k)(3)(ii), and therefore has not established he is an individual of exceptional ability. Because the Petitioner did not establish eligibility as an individual of exceptional ability, we need not address the Petitioner's assertions on appeal regarding whether a waiver of the job offer requirement, and thus of a labor certification, would be in the national interest. *See* section 203(b)(2) of the Act.

III. CONCLUSION

As the Petitioner has not satisfied at least three of the six criteria at 8 C.F.R. § 204.5(k)(3)(ii), we conclude that the Petitioner has not established that he is an individual of exceptional ability.

ORDER: The appeal is dismissed.

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[2] We take administrative notice that the Petitioner's publicly available YouTube channel hosts only three videos, with approximately 3,000 combined views, which is substantially fewer than the 200,000 views the Petitioner claims. The only video on that channel dated as of the petition filing date indicates that it has approximately 1,400 views. The Petitioner's other publicly available social media pages indicate similar statistics that contradict the Petitioner's assertions, which are not supported in the record, particularly when limited to information that existed as of the petition filing date. 8 C.F.R. § 103.2(b)(1); *see also Matter of Michelin Tire Corp.*, 17 I&N Dec. at 249.

[3] *See* 6 *USCIS Policy Manual* F.5(B)(2), https://www.uscis.gov/policymanual (stating, "[t]o satisfy this criterion, the evidence must show that the beneficiary has commanded a salary or remuneration for services that is indicative of his or her claimed exceptional ability relative to others working in the field").